Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

GLOBE NEWSPAPER COMPANY, INC.
and RICHARD A. KNOX,

Petitioners,

v.

LOIS J. AYASH, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment or the Due Process Clause of the Fourteenth Amendment prohibits a public figure libel plaintiff from recovering default judgments against the press without a showing of falsity or actual malice as a contempt sanction for refusing to disclose confidential news sources sought for non-actionable, non-libel claims.

2. Whether, and to what extent, the First Amendment prohibits the forced disclosure of confidential news sources in civil cases in the absence of jury issues on the essential elements of the plaintiff's case.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings below were the plaintiff Lois J. Ayash, M.D., and the defendants Dana-Farber Cancer Institute, David Livingston, M.D., Globe Newspaper Company, Inc. and Richard A. Knox. David Livingston, M.D., no longer is a party to the case.

Petitioner Globe Newspaper Company, Inc. is wholly owned by The New York Times Company, a publicly traded company.

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Petitioners Globe Newspaper Company, Inc., and Richard A. Knox respectfully pray that a writ of certiorari issue to review the judgment of the Massachusetts Supreme Judicial Court entered in this proceeding on February 9, 2005.

OPINIONS BELOW

The opinion of the Supreme Judicial Court (App., *infra*, 1a-56a) is reported at 443 Mass. 367, 822 N.E.2d 667 (2005). The opinions of the Superior Court (App., *infra*, 57a-68a, 69a-74a, 75a-76a, 77a-83a) are unreported. The opinion of the Massachusetts Appeals Court vacating a prior contempt sanction in this case (App., *infra*, 84a-97a) is reported at 46 Mass. App. Ct. 384, 706 N.E.2d 316 (1999).

JURISDICTIONAL STATEMENT

The Supreme Judicial Court's judgment was entered on February 9, 2005. A timely petition for rehearing was denied on March 2, 2005 (App., *infra*, 98a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of their grievances."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Preliminary Statement

In its decision below, the Massachusetts Supreme Judicial Court allowed a public figure libel plaintiff to recover damages against the press without proof of falsity or actual malice, the first court to do so in the nearly forty years since this Court ruled in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) that the First Amendment requirements of *New York Times* v. *Sullivan*, 367 U.S. 254, 279-80 (1964) apply to public figure libel claims. The Massachusetts court held that trial courts are free to disregard the constitutional requirements of a public figure libel case when entering a civil contempt sanction for a defendant's refusal to provide discovery exclusively sought for a plaintiff's legally deficient *non*-libel claims.

The sanction violated the First Amendment and the Due Process Clause for the following reasons:

1. The sanction of a default judgment entered in favor of a public figure libel plaintiff did not require proof of falsity or actual malice, in violation of the First Amendment.

2. Entering a default judgment on a public figure's libel claims bore *no* relationship to the non-libel claims in which the order to provide discovery was entered and thus was an unnecessary and overbroad infringement of First Amendment and Due Process rights.

3. The trial court explicitly ruled that the severity of the sanction was based on the defendants having previously failed to comply with a prior contempt order that had since been

overturned on appeal, thus punishing the defendants for successfully exercising their right to appeal.

4. The discovery at issue concerned the identities of confidential news sources who provided the press with accurate information on a matter of legitimate public concern about a public figure and whose identities were sought to pursue non-libel claims that failed as a matter of law. Because the sources' identities were, in the Supreme Judicial Court's words, "peripheral at best" to the legally deficient non-libel claims for which their disclosure was ordered, the sanction did not serve any legitimate, let alone compelling, state interest. App. 48a-49a.

As shown below, certiorari review is warranted because the Supreme Judicial Court's decision is directly contrary to settled federal constitutional doctrine established by this Court and punishes truthful speech on matters of what the Supreme Judicial Court called "intense public interest." App. 23a-24a. As such, the decision countervails the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 772-73 (1986), quoting *Sullivan*, 367 U.S. at 270-71, 279-80. Indeed, petitioners respectfully submit that the sanction imposed by the Massachusetts court so offends basic First Amendment and Due Process principles that summary reversal may be warranted.

Certiorari review also should be granted to provide needed guidance to lower courts faced with the task of fashioning remedies for the non-disclosure of confidential

sources sought by libel plaintiffs. The Supreme Judicial Court's decision conflicts with rulings of other state courts of last resort that have reversed on constitutional grounds default judgments entered in libel cases even when the confidential sources actually were sought in and relevant to a plaintiff's libel case. The Supreme Judicial Court's decision also conflicts with remedies adopted by other courts, state and federal, that are more narrowly tailored to avoid infringing First Amendment interests. Certiorari review therefore should be granted to resolve the conflict between lower courts on this issue of vital importance to the functioning of a free press.

Wholly apart from the sanction imposed by the lower court, the underlying order compelling the disclosure of confidential sources raises important First Amendment questions that have divided the lower courts and independently warrant certiorari review. The Supreme Judicial Court held that the petitioners "had no special constitutional .. . testimonial privilege, based on their status as a newspaper publisher or reporter, that would justify their refusal to obey the [discovery] orders." App. 49a-50a n.33. The courts of appeal and state courts of last resort sharply differ over whether or to what extent the First Amendment protects confidential news sources from compelled disclosure in civil cases. Absent certiorari review, the First Amendment rights of the press — and the rights of plaintiffs who sue the press — will continue to exist in patchwork form. Currently, those rights vary from jurisdiction to jurisdiction and in some instances (as in Massachusetts) from state court to federal court within the same jurisdiction. The conflict over the existence and scope of First Amendment protections for confidential sources in civil cases has proven prolonged, intractable and untenable, amply warranting certiorari review by this Court.

B. Statement of Facts

1. The Dana-Farber Overdose Controversy

This case arises out of a civil action brought by Lois J. Ayash, M.D. ("Ayash") against her former employer, the Dana-Farber Cancer Institute (the "Dana-Farber" or the "hospital"), the hospital's former physician-in-chief, David M. Livingston, M.D. ("Livingston"), Globe Newspaper Company, Inc., publisher of *The Boston Globe* newspaper (the "Globe"), and Richard A. Knox, a former Globe reporter currently employed by National Public Radio ("Knox").

Ayash was the Protocol Chair and Principal Investigator for a Dana-Farber experimental breast cancer treatment protocol. In November 1994, two women enrolled in the protocol were accidentally given massive overdoses of a highly toxic chemotherapy drug. One of the patients, 39 year-old Betsy Lehman, a *Boston Globe* health columnist, died as a result of the overdoses. The second patient, school teacher Maureen Bateman, survived the overdoses but suffered severe cardiac damage. App. 7a.

In the months following the discovery of the overdoses, confidential news sources provided Knox, then a Globe reporter, with accurate information that Ayash was the subject of investigations of the overdose incidents conducted by the Dana-Farber and the Massachusetts Board of Registration in Medicine. App. 45a; 9a; 12a-17a. Based on that information, as part of its coverage of the overdoses, the Globe accurately reported that Ayash was the subject of those investigations. App. 12a-17a.[1]

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1. The Globe ultimately published approximately 50 articles, columns and editorials about the overdoses. Ayash's libel claims (Cont'd)

2. Proceedings before the Trial Court

In proceedings below, Ayash initially — but only temporarily — argued that Knox's confidential sources were relevant to her libel claims against the Globe and Knox. After refusing to comply with the trial court's order to disclose their confidential sources, the Globe and Knox were held in civil contempt.[2] On appeal, the Massachusetts Appeals Court overturned both the discovery order and the contempt citation. App. 84a-97a. The Appeals Court found that the one confidential source Ayash claimed was central to her libel case in fact was already known by Ayash to be her good friend, Dr. Karen Antman. App. 86a-87a & n.7, 96a. The case was remanded to the trial court for a determination of whether the disclosure of confidential sources was required with regard to any of the counts of Ayash's complaint. App. 97a.

(Cont'd)

against the Globe and Knox were based on seven of those articles, only three of which mentioned Ayash by name. The first article, published on March 23, 1995, mistakenly reported that Ayash had countersigned the overdose order. No confidential sources were relied on for the erroneous report, which was caused by Knox misreading a signature on the dosing sheet as Ayash's. The Globe published a correction concerning the error on June 4, 1995. App. 11a n.13; 97a n.16.

2. As a sanction, the trial court imposed a series of escalating fines. The Globe was ordered to pay fines of $1,000 per day, increasing by $1,000 each successive week that the Globe remained in noncompliance. Knox was ordered to pay $100 per day, increasing by $100 each week that he failed to comply with the disclosure order. App. 88a.

On remand, Ayash abandoned her claim that the confidential sources were needed for her libel case against the Globe and Knox. App. 78a n.1; 46a; 87a. The trial court then ordered disclosure of the sources who provided Knox with accurate information about the overdose investigations, ruling that their identities were critical to Ayash's *non*-libel claims against the hospital for leaking confidential information about her and her infliction of emotional distress claim against Knox for publishing that information. App. 45a, 79a-82a; 87a.[3]

When the Globe and Knox refused to comply with the second disclosure order, the trial court again found them in contempt, even though the Globe and Knox then had pending motions for summary judgment seeking the dismissal of all of Ayash's claims against them. App. 51a n.34. Rather than rule on the pending summary judgment motions, the trial court entered a default judgment of liability in favor of Ayash on her libel claims against the Globe and Knox, as well as on her claims against Knox for infliction of emotional distress and interference with business relations. App. 72a-73a.[4]

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3. The trial court earlier had ruled that the Globe's and Knox's publication of confidential information about the investigations of Ayash was not actionable under either Massachusetts law or the First Amendment, but made no mention of that ruling in its disclosure order. Ayash did not appeal from the dismissal of that privacy claim. App. 2a-3a n.3. Although the trial court also found the sources relevant to Ayash's claims that the hospital's disclosures violated certain contract-based rights, Ayash did not pursue those breach of confidentiality theories, undoubtedly because, as the Supreme Judicial Court held, such contract-based claims — unlike an invasion of privacy claim — do not permit the recovery of emotional distress damages. *See e.g.*, App. 28a. *See also* App. 2a n.2, 25a.

4. When Ayash learned that one of Knox's confidential sources later provided him with information about other topics after the (Cont'd)

The trial court explicitly acknowledged that it had chosen the severe sanction of a default judgment because the Globe and Knox had refused to comply with the court's earlier contempt order — the very order overturned by the Massachusetts Appeals Court. Referring to its prior contempt order, the trial court ruled, "[u]nfortunately, that determination, and the resultant financial sanctions imposed by the court, have not succeeded in securing the Globe Defendants' compliance with the court's discovery orders. Thus, the court must and does impose an alternative sanction authorized by Rule 37(b)(2) — the entry of a default judgment." App. 72a.

As a result of the default judgment, the case was tried before a jury without the Globe and Knox having an opportunity to present a defense on the merits to Ayash's claims. The jury returned a damages award of $2.1 million against the Globe and Knox (with 12% per annum interest from February 1996). The verdict was comprised of $1,890,000 in libel damages ($1,680,000 against the Globe and $210,000 against Knox) and $210,000 in damages against Knox for infliction of emotional distress and interference with business relations. The jury awarded Ayash another $2.1 million on her claims against the Dana-Farber and Livingston. Petitioners' post-trial motions challenging the constitutionality of the discovery order and the contempt sanction were denied by the trial court. App. 66a-67a.

(Cont'd)
overdoses articles without requesting confidentiality, she obtained a further order compelling Knox to identify all Dana-Farber employees who had been non-confidential sources during the two years *after* the overdose articles. App. 46a, 75a-76a. Because the interrogatory obviously was designed to identify a specific confidential source, the Globe and Knox refused to comply with the order.

3. The Supreme Judicial Court's Decision

On appeal, the Supreme Judicial Court ruled that, even without the disclosure of Knox's confidential sources, the evidence at trial was sufficient to prove that the hospital disclosed confidential information about Ayash. App. 22a & n.17. The court nevertheless held that Ayash's privacy claim against the hospital failed "as a matter of law" because "the disclosures about the plaintiff's professional conduct were part of a matter of intense public interest and were not, in any event, of an exceedingly personal or intimate nature. . . ." App. 23a-24a. The court also held that Ayash was a public figure "by reason of her status as chair and principal investigator of an experimental research protocol under which two patients at a prominent research institution received chemotherapy overdoses." App. 23a. The court entered judgment notwithstanding the verdict in favor of the Dana-Farber and Livingston on all of Ayash's claims except for her claim that she had been fired in retaliation for filing a sex discrimination charge. App. 19a-44a.

Given these legal rulings, the Supreme Judicial Court acknowledged that "it might be tempting" to take issue with the trial court's finding that the plaintiff had a compelling need for the sources' identities to pursue her meritless non-libel claims and to "express our opinion that the identities of any confidential sources were, in the end, *peripheral at best* to the plaintiff's case." 48a-49a (emphasis added). *See also* n.3, *supra*. The court nevertheless rejected the petitioners' arguments that the sanction was overly broad and punitive. The court affirmed the default judgment and the underlying discovery order as within the trial court's "broad measure of discretion," holding that the petitioners "had no special constitutional .. . testimonial privilege, based on their status

as a newspaper publisher or reporter, that would justify their refusal to obey the [discovery] orders." App. 47a-51a & n.33.

REASONS FOR GRANTING THE PETITION

A. Certiorari Review Should be Granted Because the Decision of the Massachusetts Supreme Judicial Court Directly Conflicts with Governing First Amendment and Due Process Decisions of this Court.

The Supreme Judicial Court's decision allowed a public figure libel plaintiff to recover damages against the press without proof of the constitutionally required elements of falsity or actual malice. According to the Supreme Judicial Court, the power of civil contempt gave the state trial court a "broad measure of discretion" to disregard the First Amendment's requirements for a public figure libel case, even though the sanction was entered for the failure to produce discovery sought solely for non-libel claims that failed as a matter of law. App. 21a-24a, 45a, 48a-49a. Speech on a matter of public concern about a public figure thereby lost all of its constitutional protections without any showing — indeed, without so much as a contention — that the plaintiff was denied access to *any* evidence needed to pursue her libel claim.

The use of the contempt power in the manner upheld by the Supreme Judicial Court contravenes long-established First Amendment and Due Process precedent of this Court. The importance of the First Amendment's safeguards for speech concerning public figures and public affairs, combined with the Supreme Judicial Court's failure to abide by longstanding precedent of this Court, well-warrants certiorari review of the lower court's ruling. *See generally Craig* v.

Harney, 331 U.S. 367, 368 (1947) (certiorari granted to review whether contempt judgment against press violated the First Amendment "because of the importance of the problem and because the ruling of the [state] court raised doubts whether it conformed to principles announced in [this Court's precedent]"); *Bridges* v. *California*, 314 U.S. 252, 258-59 (1941) (certiorari granted in contempt case because of the "importance of the constitutional question" concerning "our national constitutional policy safeguarding free speech and a free press"); *Thompson* v. *City of Louisville*, 362 U.S. 199, 203 (1960) ("although the fines here are small, the due process questions presented are substantial and we therefore granted certiorari"); *Montana* v. *Kennedy*, 366 U.S. 308, 309 (1961) (certiorari granted "in view of the apparent harshness of the result entailed").

To paraphrase the *Sullivan* Court, "[contempt sanctions] can claim no talismanic immunity from constitutional limitations." 367 U.S. at 269. "The history of the power to punish for contempt . . . and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." *Craig*, 331 U.S. at 373. *See also Bridges*, 314 U.S. at 262 (applying clear and present danger test to validity of contempt power as applied to publications).

A court's exercise of the power of contempt therefore does not lighten the constitutional burden that must be met to justify restrictions on free speech rights. "[I]t has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden

of showing that its restriction is justified." *Hepps*, 475 U.S. at 777. In addition, any state action restricting free speech must be narrowly drawn to serve a compelling state interest. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("[W]e are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved."). *See generally Consolidated Edison Co.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 530, 540 (1980); *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986).

Because of the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern," the First Amendment "allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 52 (1988) (emphasis in original). *See also Gertz*, 418 U.S. at 343; *Butts*, 388 U.S. 130. In *Hepps*, for example, this Court held that a private figure libel plaintiff suing on a matter of public concern was constitutionally required to bear the burden of proving falsity even though the Pennsylvania Shield Law prevented him from obtaining the identity of the confidential sources of the statements that he claimed defamed him. *See Hepps*, 475 U.S. at 779 ("In the situation before us, we are unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law."). Under these bedrock First Amendment principles, a state court's contempt powers do not authorize an order that indiscriminately eviscerates the constitutional

protections for speech about a public figure as a sanction for the failure to produce discovery on unrelated non-libel claims.

Moreover, a discovery sanction entered on claims other than the one in which the discovery at issue was ordered is, as a matter of law, a punitive sanction that violates the First Amendment and the Due Process Clause. As this Court ruled in *Insurance Corp. of Ireland, Ltd.* v *Compagnie des Bauxites de Guinee*, due process requires that a discovery sanction must be "specifically related to the particular 'claim' which was at issue in the order to provide discovery." 456 U.S. 694, 706, 707 (1982). *See generally Hovey* v. *Elliott*, 167 U.S. 409, 446-47 (1897) (default judgment entered for the failure to obey a court order to pay money into court was a form of punishment and therefore violated due process). The First Amendment requires no less by way of procedural safeguards before damages may be awarded for speech about a public figure. *See generally Speiser* v. *Randall*, 527 U.S. 513, 520-21 (1958); *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965).[5] Because the sanction struck constitutional elements of and defenses to a public figure's libel claim as a penalty for the failure to produce discovery in unrelated non-libel claims, it violated the First Amendment and the Due Process Clause.

In this case, the punitive nature of the sanction also is apparent from the rationales expressed by the lower courts. Massachusetts law requires a party resisting discovery to be held in contempt before having the right to appeal.[6] The trial

5. *See also* H. P. Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 518-19 (1970).

6. *See In the Matter of a Grand Jury Subpoena*, 411 Mass. 489, 490, 583 N.E.2d 241, 243 (1992) (no right to appeal disclosure order absent finding of contempt).

court nevertheless explicitly ruled that its reason for choosing the ultimate sanction of a default judgment was that the Globe and Knox had not obeyed a prior contempt sanction before it was overturned by the intermediate state appellate court. App. 72a. Similarly, the Supreme Judicial Court's conclusion that the default judgment was warranted because the petitioners made a "deliberate choice" to protect their sources and to "forgo their (potentially meritorious) defenses to the claims asserted against them rather than obey the judge's orders," placed the petitioners in the untenable position of either waiving all rights to appeal by complying with the discovery order or having their attempt to exercise appellate rights held against them. App. 49a. Under the reasoning of both lower courts, the exercise of the right to appeal was treated as a justification to strike constitutional elements of and defenses to a libel claim. App. 49a, 72a. *Compare Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (punishing a person who has done 'what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'") (citations omitted).

The needless nature of these constitutional violations is underscored by the Supreme Judicial Court's holding that Ayash's privacy claims against the Dana-Farber failed as a matter of law, and by the court's ruling that even without the revelation of Knox's sources, the evidence was sufficient to prove that the hospital made the disclosures at issue. App. 22a & n.17, 24a. Ayash's infliction of emotional distress claim against Knox — the other asserted basis for the discovery order — similarly sought recovery for the publication of the very same "confidential" information at

issue in Ayash's failed privacy claim against the hospital and found otherwise not actionable against the Globe and Knox. *See* note 3 *supra*; App. 2a-3a n.3, 23a-24a, 80a. The lower court therefore used meritless civil tort claims as a basis for entering sweeping default judgments on plaintiff's claims, depriving the petitioners of fundamental First Amendment and Due Process rights. *See generally Bartnicki* v. *Vopper*, 532 U.S. 514, 534 (2001) (First Amendment protected dissemination by the press of newsworthy recording of private telephone conversation even if press had reason to know the tape had been obtained by means of an illegal interception). Under these circumstances, the Supreme Judicial Court's statement that the confidential sources were "peripheral at best" to the plaintiff's case was not the result of what the court euphemistically described as a temptation gained by the clarity of hindsight. App. 48a-49a. To the contrary, it was an impulse to state the obvious, and betrays the glaring constitutional defects in the court's ruling that justify certiorari review.

Even assuming, moreover, that Ayash's privacy claims against the hospital or her emotional distress claim against Knox had legal merit, the trial court had ample alternative remedies to entering a default judgment, including the imposition of fines, incarceration or, in the case of the emotional distress claim against Knox, a preclusive order tailored to the alleged relevance of the source to that claim. The decision to forego all such alternatives in favor of an indiscriminate default judgment was a needlessly overbroad violation of petitioners' First Amendment and Due Process rights. The importance of the constitutional interests presented well-warrants plenary review and may also warrant summary reversal.

B. The Supreme Judicial Court's Decision Conflicts with Decisions of State Courts of Last Resort and Circuit Courts of Appeal.

Certiorari review also should be granted because the decision of the Supreme Judicial Court is in direct conflict with decisions of other state courts of last resort. Those courts have held that even when confidential sources are properly sought as part of a plaintiff's libel case, a sanction that precludes any and all defenses is an overly broad and punitive infringement of protected constitutional interests. *See Sierra Life* v. *Magic Valley Newspapers*, 101 Idaho 795, 799-801, 623 P.2d 103, 108-10 (1980) (trial court's sanction was "overly harsh and in the nature of punishment" because there was no suggestion that revelation of confidential source would have produced sufficient proof to sustain a judgment); *Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 62 N.Y.2d 158, 166-67, 464 N.E.2d 967, 971 (1984) ("[a] newspaper should not be required to accept substantial financial loss as the price for continuing to honor a commitment to maintain the confidentiality of one of its sources"), *cert. denied*, 469 U.S. 1158 (1985). *See also Mitchell* v. *Watson*, 58 Wash. 2d 206, 361 P.2d 744 (1961) (reversing default judgment for failure to identify source).

The Supreme Judicial Court's decision also conflicts with several decisions of circuit courts of appeal holding that a discovery sanction entered on a claim other than the one in which the discovery was sought is a violation of due process of law.[7] *See also* J. Golinski, *The Second Circuit's Imposition*

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7. *See, e.g., General Ins. Co. of Am.* v. *Eastern Consol. Util., Inc.*, 126 F.3d 215, 220-21 (3d Cir. 1997); *United States* v. *Kahaluu Const. Co., Inc.*, 857 F.2d 600, 602 (9th Cir. 1988); *Fjelstad* v. (Cont'd)

of Litigation-Ending Sanctions for Failures to Comply with Discovery Orders: Should Rule 37(B)(2) Defaults and Dismissals be Determined by a Roll of the Dice?, 62 Brook. L. Rev. 585, 588 (1996) (noting the lack of uniformity among circuits for determining when "litigation-ending" sanctions should be imposed).

The conflict created by the Supreme Judicial Court's decision by itself warrants certiorari review. Lower courts frequently are faced with requests for the disclosure of confidential sources in libel cases. When disclosure is ordered (as, for example, when the source is found relevant to the issue of the standard of care) those courts often must address the appropriate sanction for non-disclosure of a confidential source's identity. Such sanctions have ranged from (a) entry of a presumption that there was no source for the statement at issue[8]; (b) a jury instruction that there was no source[9]; (c) an order precluding the defendants from relying on the

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American Honda Motor Co., Inc., 762 F.2d 1334, 1342-343 (9th Cir. 1985); *Caryl Richards, Inc.* v. *Superior Court*, 188 Cal. App. 2d 300, 305, 10 Cal. Rptr. 377, 381 (1961).

8. *See DeRoburt* v. *Gannett Co.*, 507 F. Supp. 880, 887 (D. Haw. 1981) (sanction for non-disclosure was presumption that defendants had no sources); *Downing* v. *Monitor Publ'g*, 120 N.H. 383, 387, 415 A.2d 683, 686 (1980) (refusal to disclose source of quoted statement resulted in entry of presumption at trial that reporter had no source for statement).

9. *Dalitz* v. *Penthouse Int'l Ltd.*, 214 Cal. Rptr. 254, 260, 168 Cal. App.3d 468, 478 (1985) ("failing disclosure the jury would be instructed that there was no source for the article other than those disclosed").

sources for any part of their defense[10]; and (d) an order waiving any protection if the source is used by the defense.[11] Still other lower courts have ruled that a journalist is entitled to testify that he obtained information from what he considered to be a reliable confidential source, and the plaintiff is entitled to attempt to impeach that testimony without the source's identity being revealed.[12] No lower court, however, has approved of a sanction as severe as the default libel judgment affirmed by the Supreme Judicial Court below.

The significance of the Supreme Judicial Court's decision reaches far beyond the parties to this case. As this Court has stated, "a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public

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10. *Dowd* v. *Calabrese*, 577 F. Supp. 238, 244 (D.D.C. 1983) (precluding defendants from relying upon existence of any unidentified source as evidence of truth or lack of malice); *Sands* v. *News America Publishing Co.*, 161 A.D.2d 30, 37, 560 N.Y.S.2d 416, 421 (1990) (precluding defendants from introducing into evidence confidential source information unless disclosed in advance to plaintiff).

11. *Laxalt* v. *McClatchy*, 116 F.R.D. 438, 452 (D. Nev. 1987) ("if the defendants choose to prove their defense through witnesses whose identities are protected by this order, the defendants will be deemed to have waived the privilege"); *Mazzella* v. *Philadelphia Newspapers, Inc.*, 479 F. Supp. 523, 529 n.3 (E.D.N.Y. 1979) (use of confidential sources as part of defense renders sources' identities discoverable).

12. *Sharon* v. *Time Inc.*, 599 F. Supp. 538, 582-83 (S.D.N.Y. 1984); *Sprague* v. *Walter*, 518 Pa. 425, 441, 543 A.2d 1078, 1086 (1988).

figures that does have constitutional value." *Hustler*, 485 U.S. at 52. The Massachusetts court went far beyond the First Amendment's prohibition against strict liability, however, by affirming a libel award without requiring proof of *any* element of the plaintiff's case. Because default judgments by their nature "deter those who might be tempted to such conduct in the absence of such a deterrent," *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976), unless certiorari review is granted, the sanction approved by the Massachusetts court will chill the constitutionally protected conduct of litigants in other cases.

This case presents the ideal vehicle to resolve this important issue. The issue is presented clearly and simply in a recurring context — a request by a libel plaintiff for an order compelling the disclosure of a confidential news source. Certiorari review should be granted to settle the important issues concerning fundamental First Amendment freedoms and related Due Process rights presented by the Supreme Judicial Court's ruling.

C. Certiorari Review Should Be Granted to Resolve the Longstanding Conflict Concerning Whether and to What Extent the First Amendment Protects Confidential Sources Sought in Civil Cases.

The Supreme Judicial Court held that the Globe and Knox "had no special constitutional . . . testimonial privilege, based on their status as a newspaper publisher or reporter, that would justify their refusal to obey the [discovery] orders." App. 49a-50a n.33. The issue decided by the Supreme Judicial Court has divided lower courts since this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). During that time period, nine federal courts of appeals have held

that, in civil cases, the First Amendment provides a qualified protection for confidential news sources.[13] Several state courts of last resort have reached the same conclusion.[14] *See generally Branzburg*, 408 U.S. at 707-08; *see also id.* at 709-10 (Powell, J., concurring).

Due in large part to sharply divergent interpretations of the *Branzburg* decision and its focus on the criminal justice system, however, there is a lack of uniformity among federal and state courts as to whether the First Amendment provides any protection for confidential news sources in civil cases.[15]

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13. *See Zerilli* v. *Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *Gonzales* v. *National Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999); *Riley* v. *City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979); *LaRouche* v. *National Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller* v. *Transamerica Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert denied*, 483 U.S. 1021 (1987); *Cervantes* v. *Time, Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Shoen* v. *Shoen*, 5 F.3d 1289, 1292-293 (9th Cir. 1993); *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

14. *See Mitchell* v. *Superior Court*, 37 Cal.3d 268, 279, 690 P.2d 625, 632 (1984); *Winegrad* v. *Oxberger*, 258 N.W.2d 847, 850 (Iowa 1977); *Grand Forks Herald* v. *District Court*, 322 N.W.2d 850, 855 (N.D. 1982); *Hopewell* v. *MidContinent Broad.*, 538 N.W.2d 780, 782 (S.D. 1995); *State ex. rel. Hudok* v. *Henry*, 182 W. Va. 500, 505, 389 S.E.2d 188, 193 (1989).

15. *See generally*, Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975), reprinted in 50 Hastings L.J. 705, 709 (1999) ("the [*Branzburg*] Court rejected the [privilege] claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion,

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The Seventh Circuit, for example, has concluded in a civil case that *Branzburg* forecloses the recognition of First Amendment protection for reporters. *McKevitt* v. *Pollasch*, 339 F.3d 530, 533 (7th Cir. 2003). *See also In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987) ("we decline to join some other circuit courts, to the extent that they have . . . adopted the qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority [citing five circuit courts that applied the privilege in civil cases]"); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) ("at least in [civil] situations distinct from *Branzburg*," it is "unsettled" whether the protections are constitutional requirements or "prudential considerations"); *Gagnon* v. *District Court*, 632 P.2d 567, 569 & n.2 (Colo. 1982) (affirming trial court's refusal to recognize a qualified First Amendment privilege in civil cases); *Atlanta Journal-Constitution* v. *Jewell*, 251 Ga. App. 808, 812-14, 555 S.E.2d 175, 179 (2001) ("[t]he United States Supreme Court has declined to recognize or create a testimonial privilege for journalists under the First Amendment to the United States Constitution"), *cert. denied*, Georgia Supreme Court (Feb. 11, 2002), *cert. denied*, 537 U.S. 814 (2002).

Moreover, those courts holding that the First Amendment provides some level of protection against the forced

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perhaps by a vote of four and a half to four and a half"); Jennifer L. Marmon, Note, *Intrusion and the Media: An Old Tort Learns New Tricks*, 34 Ind. L. Rev. 155, 158 (2000) ("[t]he lower courts have struggled to interpret the conflicting principles of *Branzburg*, and the level of constitutional protection extended to newsgathering remains unsettled.").

disclosure of confidential news sources in civil cases have reached varying formulations of the governing constitutional test. *See McKevitt,* 339 F.3d at 532 ("[a] large number of cases" have recognized a reporter's privilege under *Branzburg* but "do not agree on its scope.").[16] State legislatures have attempted to fill this void at a non-constitutional level, but the shield laws now enacted in thirty-one states and the District of Columbia contain widely divergent standards for what information is entitled to protection and under what circumstances.[17]

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16. *Compare Bruno & Stillman, Inc.*, 633 F.2d at 597 ("[P]laintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery . . . [T]he court [then] must assess the extent to which there is a need for confidentiality."); *Miller*, 628 F.2d at 932 (adopting a three part test: (1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information); *Mitchell* v. *Superior Court*, 37 Cal.3d 268, 279-83, 690 P.2d 625, 632-34 (1984) (adopting a five factor test, including exhaustion of alternative sources of obtaining the information; "mere relevance is insufficient to compel discovery; disclosure should be denied unless the information goes to "the heart of the plaintiff's claim"); *Winegard*, 258 N.W.2d at 852 (plaintiff must show (1) "the information is necessary or critical to the involved cause of action or defenses pled"; and (2) "other reasonable means available by which to obtain the information sought have been exhausted").

17. *See e.g.*, N.Y. Civ. Rights Law § 79-h (absolute privilege for a news reporter to refuse to disclose confidential sources); Fla. Stat. Ann. § 90.5015 (information must be "relevant and material to unresolved issues," unavailable from alternative sources, and serve a "compelling interest").

The differences between these varying approaches is dramatically illustrated in Massachusetts, where vastly different standards apply depending upon whether the discovery is sought in federal or state court. The First Circuit, like some other courts, requires a libel plaintiff seeking to compel the disclosure of confidential news sources to establish, among other things, "jury issues on the essential elements of its case not the subject of the contested discovery." *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980).[18] The Supreme Judicial Court, in contrast, has held that the First Amendment provides absolutely no protection for confidential sources and that disclosure may be ordered even in pursuit of a meritless claim. App. 48a-50a & n.33. Whether the Globe is sued in federal or state court therefore has determined whether its confidential sources are entitled to any level of federal constitutional protection. *See also In re Roche*, 381 Mass. 624, 634 n.11, 411 N.E.2d 466, 473 n.11 (1980) ("The only privilege of Federal constitutional dimension available at deposition to a [journalist] is the Fifth Amendment right against self-incrimination."); *Bruno & Stillman*, 633 F.2d at 595 ("courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights").

The conflicting approaches taken by federal and state courts, as well as state legislatures, as to whether and to what

18. *See also Jewell*, 251 Ga. App. at 814, 555 S.E.2d at 181 ("The trial court should then look to the entire record to determine if each particular claim is legally viable, and if it is, the trial court can then perform the necessary balancing test as to each legally viable allegation of libel."); *Cervantes*, 464 F.2d at 990-94 (granting summary judgment and refusing to order disclosure in view of lack of independent evidence to support claim).

extent confidential sources are entitled to protection from discovery in civil litigation underscore the need for this Court to establish a uniform constitutional floor applicable to all members of the press, regardless of the jurisdictions in which they work or are amenable to process. The uncertainty created by the longstanding conflict is untenable and has existed for a prolonged period. The conflict exists across a number of appellate decisions; the issue has been fully vetted by the lower courts; and the disagreement is unlikely to diminish with the further passage of time. Absent certiorari review, the First Amendment rights of the press and the rights of those who sue the press will continue to vary from state to state and, in some instances — as in Massachusetts — within the same state depending on whether suit is brought in federal or state court.

In this case, a confidential news source provided Knox with accurate information that, according to the Supreme Judicial Court, concerned a matter of "intense public interest" relating to a public figure. App. 23a-24a, 45a. There is no doubt that those communications were protected by the First Amendment. *See Bartnicki*, 532 U.S. at 534; *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 830 n.1 (1978). To intrude upon such a constitutionally protected communication in pursuit of a legally meritless claim is, by any definition, "to probe at will and without relation to existing need" in violation of the First Amendment. *DeGregory* v. *New Hampshire Att'y Gen.*, 383 U.S. 825, 829 (1966). Contrary to the Supreme Judicial Court, absent a demonstrable connection between the discovery sought and a viable legal claim, trial courts have no "broad measure of discretion" to infringe upon protected First Amendment

interests. App. 50a.[19] Because of the importance of the issue to the functioning of a free press, the longstanding conflict concerning whether and the extent to which the First Amendment protects confidential sources from disclosure in civil cases — and, in particular, public figure libel cases — should be finally resolved by this Court.

CONCLUSION

Whether the First Amendment provides the press with protections beyond those available to members of the general public has been, and may continue to be, a question debated by scholars and jurists alike. *See e.g.*, Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975), *reprinted in* 50 Hastings L.J. 705 (1999). There can be no doubt, however, that the press has no fewer rights to free speech and due process of law than does every member of the public. The Supreme Judicial Court's decision flouted that settled constitutional principle in two ways: first, by punishing speech on a matter of public concern about a public figure as a sanction for the failure to provide discovery sought solely for legally deficient, unrelated non-libel claims; and second, by allowing a default judgment in a public figure libel case without proof of falsity or actual malice. The lower court's

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19. For example, the Supreme Judicial Court stated that Ayash had the right to know if it was Livingston who had divulged confidential information to the Globe. App. 49a. After obtaining Livingston's consent, however, Knox testified as to all of his interviews with Livingston without asserting any claim of privilege. The court also asserted that the Globe and Knox's refusal to comply with the discovery orders precluded Ayash from proceeding against all defendants on a theory of joint and several liability (although there was and is no issue as to the collectability of the judgments below nor is there any viable joint theory in the case that the identity of the confidential source conceivably would bear on). App. 49a.

decision abridges First Amendment and Due Process rights in a manner that directly conflicts with precedent of this Court and decisions of lower courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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